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No. _____

In the

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,
Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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75 pp

QUESTION PRESENTED FOR REVIEW

Must a property owner sell transferable development rights (TDRs) and apply for agency approval of the sale in order to ripen a takings claim under the *Williamson County* final decision requirement:

a) when the regulatory agency has already conclusively determined that no viable use of her parcel of land will be permitted;

b) when a TDR transfer will not allow her to make any use of her parcel of land; and

c) when the maximum extent of TDRs available for transfer are already definite and certain, and can be valued by normal appraisal methods?

PARTIES TO THE PROCEEDING

The parties to this action in the United States Court of Appeals for the Ninth Circuit were Bernadine Suitum and the Tahoe Regional Planning Agency.

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OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 80 F.3d 359 (9th Cir. 1996), and is reproduced as Appendix A (App.). Page references are to the version in the Appendix.

JURISDICTION

The decision of the Ninth Circuit was entered April 1, 1996. Petitioner filed a timely petition for rehearing, and rehearing was denied on May 13, 1996. Appendix B. The petition for writ of certiorari has been timely filed in accordance with Rule 13.3 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42, United States Code, § 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The relevant portions of the Tahoe Regional Planning Agency (TRPA) code are excerpted in Appendix F at 1-11.

STATEMENT OF THE CASE

Respondent TRPA[1] has determined that petitioner Bernadine Suitum cannot develop her 18,300 square foot parcel of land located in a developed residential subdivision in Incline Village, Nevada. This fact would normally be a *per se*, categorical violation of the Takings Clause, which prohibits the government from taking private property for public use unless just compensation is paid to the landowner. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), this Court held that the denial of all economically beneficial or productive use of land is a Takings Clause violation.

But Mrs. Suitum could not get the federal court to rule on the merits of her case. TRPA had artificially carved up the necessary elements of land development--separating the right to build in a given year (an allocation) from the right to build a structure (a residential development right) from the right to occupy a certain amount of ground space (land coverage).

These elements would seem irrelevant to Mrs. Suitum, since TRPA had forbidden her from developing her lot. But TRPA has deemed these elements transferable, and argued that Mrs. Suitum must go through the process of selling them before she can bring a court challenge to TRPA's ban on the development of her land.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190-94 (1985), this Court held that the government must first reach a

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[1] TRPA regulates property in the Lake Tahoe region. It was formed by agreement between the States of California and Nevada--an agreement ratified by Congress in the 1969 Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969), and amended in 1980, Pub. L. No. 96-51, 94 Stat. 3233; Cal. Government Code § 66801; Nevada Rev. Stat. § 277.200.

definitive position on the amount of development its regulations will allow on a parcel of land before the owner of that land can bring a court challenge to the application of those regulations. *Id.* The court below applied this "final decision" ripeness doctrine to Mrs. Suitum's case and held it was not ripe because she had not sold development rights from her parcel of land to other owners of land. *Suitum v. Tahoe Regional Planning Agency*, App. A at 9.

A. TRPA Prohibited Mrs. Suitum from Developing Her Lot

Mrs. Suitum and her late husband acquired the Incline Village property in 1972. On three sides of the parcel are lots with residences, and the fourth side borders on a paved street with a curb, gutter, and all utilities necessary for a single-family residence. First Amended Complaint, Court Record (CR) 36, ¶ 3.

In 1989, Mrs. Suitum submitted to TRPA plans to build a residence on the parcel. TRPA evaluated Mrs. Suitum's land and determined that the parcel was located in a Stream Environment Zone (SEZ).[2]

TRPA's policy is that "no new land coverage or other permanent land disturbance shall be permitted" in a Stream Environment Zone except for certain limited public uses such as outdoor recreation facilities--uses which are incompatible

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[2] These are areas which, according to TRPA, "provide surface water conveyance from upland areas into Lake Tahoe and its tributaries." *See* excerpts from Regional Plan for the Lake Tahoe Basin, Goals and Policies, Tahoe Regional Planning Agency, September 17, 1986, contained in Appendix E at 1 (from a document filed by TRPA in the District Court, as Exhibit B to the Affidavit of Susan E. Scholley in Support of Motion for Summary Judgment, CR 66).

with Mrs. Suitum's residential neighborhood.[3] Enforcing this policy, under its 1987 Plan TRPA designated the property ineligible for development. As a result, there is absolutely no use to which Mrs. Suitum can put her land.

Mrs. Suitum appealed the determination that she could not build on her lot because of its location in a Stream Environment Zone. After a public hearing, the TRPA Governing Board denied the appeal on November 29, 1990.

B. Mrs. Suitum Filed a Takings Claim with the District Court Seeking Compensation for TRPA's Denial of Economically Beneficial Use of Her Property

Mrs. Suitum then filed a lawsuit in the United States District Court for the District of Nevada, alleging that TRPA's application of its regulations and ordinances to her property *inter alia* violated her civil rights under the Fifth and Fourteenth Amendments to the United States Constitution, and took her property without payment of just compensation.[4]

This Court held in *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1015, that government regulation of property is a categorical violation of the Takings Clause when the "regulation denies all economically beneficial or productive use of land." The *Lucas* Court described this per se rule as applying "typically" to regulations "requiring land to be left in its natural state." *Id.* at 1018. TRPA's ban on "additional land coverage or other permanent land

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[3] Appendix E at 1-2; *see also* TRPA Code of Ordinances (TRPA Code) § 20.4.B, App. F at 4-7.

[4] The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and 42 U.S.C. § 1983. The original complaint was filed on January 28, 1991 (CR 1). A First Amended Complaint was filed on September 16, 1992 (CR 36).

disturbance" in a Stream Environment Zone, TRPA Code § 20.4, App. F at 4, requires that Mrs. Suitum leave her property in its natural state.

C. The District Court Inquired About the Transferable Development Rights Process

When TRPA moved for summary judgment in the District Court, the court focused on the issue of "transferable development rights," or TDRs. In an order dated November 23, 1993, the district judge acknowledged that Mrs. Suitum "may not develop or build on the parcel of land she owns and that no development rights may be transferred *to* the property at issue." App. D at 3.

Under TRPA's Code it is possible for owners of property located in a Stream Environment Zone to transfer to others certain development rights. Because "the transfer of rights is the *only* avenue not yet pursued" by Mrs. Suitum, App. D at 3, and TRPA claimed "that an application for transfer is the only 'meaningful application' that can be made in this case," the court asked for briefing on the relevance of these rights to the ripeness of Mrs. Suitum's claims against TRPA. App. D at 4.

The land development process adopted by TRPA requires that a property owner possess three distinct "rights" in order to develop property that TRPA has deemed suitable for development. These rights, which can be transferred to development-eligible lots, are as follows:

1. Development Allocations

TRPA distributes 300 residential development allocations each year, as the means to limit the number of residential units annually constructed in the Lake Tahoe region.[5] A property owner needs one allocation for every

[5] Affidavit of Lyn Barnett (Barnett Aff.), Exhibit A to Defendant TRPA's Memorandum Concerning Its Transfer of Development Program at ¶ 10, CR 74.

unit to be built, and allocations which are not used within one year are forfeited. Allocations do not come automatically with a parcel of land, but must be obtained through the county in which one's land is located. Mrs. Suitum's county reserves 6 of its 60 annual allocations for parcels that TRPA deems ineligible for development. These are distributed by lottery.[6]

2. Residential Development Rights

Each vacant residential parcel automatically has one residential development right, authorizing the building of one residential unit. Multi-unit development requires the owner to acquire residential units from other properties.[7] An undeveloped parcel in a Stream Environment Zone can transfer an additional three "bonus units." TRPA Code §§ 35.2.C, 35.2.D(4)(b), App. F at 10-11.

3. Land Coverage

Land coverage is the area of a lot that can be covered by an impervious surface. Each lot, based on its category, has a percentage of its area allowed as "base coverage." TRPA Code § 20.3.A, App. F at 1. Unused base coverage can be transferred to another parcel, up to certain limits. The base coverage for land in a Stream Environment Zone is 1% of the size of the lot. TRPA Code § 20.3.A, App. F at 1. Thus, Mrs. Suitum is eligible to transfer to another property owner 183 square feet of additional land coverage on the buyer's land. *Suitum v. Tahoe Regional Planning Agency*, App. [illegible] at 6.

TRPA's ordinances establishing the transfer process, excerpted in Appendix F, definitively determine whether a particular parcel of land in a Stream Environment Zone possesses the transferable development rights fabricated by TRPA. Unused base land coverage may be transferred.

[6] Barnett Aff. at ¶ 11.

[7] Barnett Aff. at ¶ 8.

TRPA Code § 20.3.C(2)(c), App. F at 2. A residential allocation may be transferred, if one was obtained from the county. TRPA Code § 34.3.A, App. F at 8-9. Residential development rights may be transferred from vacant parcels. TRPA Code § 34.2.A, App. F at 7. In all of these cases, TRPA conditions the transfer of these development rights upon the permanent retirement of the parcel of land by its owner--accomplished by recording deed restrictions "permanently removing the development rights" from the land. TRPA Code §§ 20.3.C(7)(a), App. F at 3-4; 34.2.B, App. F at 7; 34.5.A, B, H, App. F at 10.[8] In other words, a property owner such as Mrs. Suitum, with vacant land in a Stream Environment Zone, may transfer unused land coverage, one residential development right plus three bonus units, and a residential allocation (if one was won in a lottery)--provided she has agreed to keep the land forever in its natural state. TRPA Code §§ 20.3.C(7), App. F at 3; 34.5, App. F at 9.

For each transferable development right, Mrs. Suitum's eligibility as a transferor is straightforward: the conclusive factors are whether a parcel is in a Stream Environment Zone (it is), is vacant (it is), has unused base land coverage (it does), has a residential allocation (she did not enter the lottery for one), and is to be "permanently retired." TRPA's approval is not required to establish the right to be transferred, but instead is required to allow the transfer to take place. *See* Transfer Approval Form, reproduced in Appendix G at 1-3.[9] The TRPA approval process makes no determination on the use of Mrs. Suitum's property

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[8] For land in a Stream Environment Zone, this "retirement" provides for three additional "residential bonus units," allowing the acquirer of the rights to construct three residential units if that acquirer has otherwise qualified to use those rights. TRPA Code § 35.2.C-D, App. F at 10-11.

[9] This form was Exhibit "ff" to the Barnett Aff.

or on the rights she has to transfer. Rather, TRPA determines the eligibility of the *recipient* to use the rights. TRPA Code §§ 20.3.C, App. F at 1; 34.2.C-D, App. F at 7-8; 34.3.B-D, App. F at 9.

D. The District Court Refused Jurisdiction on the Ground That TRPA Had Yet to Reach a Final Decision as to the Extent of Use of Mrs. Suitum's Property

After the parties briefed the transferable development rights issue, the District Court considered the ripeness of Mrs. Suitum's lawsuit. Under this Court's *Williamson County* decision, a property owner does not have a ripe claim that the application of a regulation to her property violates the Takings Clause if the property owner

> has not yet obtained a final decision regarding how [she] will be allowed to develop [her] property.

Williamson County, 473 U.S. at 190. This Court explained

> the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations ... simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Id. at 191.

Williamson County specifically discussed development plans and variances that would allow development as the types of applications a property owner must submit in order to satisfy this "final decision" doctrine. 473 U.S. at 187-88. The District Court conceded that these types of applications were not an option for Mrs. Suitum, calling the transfer of development rights "the only avenue not yet pursued." Appendix C at 2.

In an order dated March 30, 1994, the District Court granted TRPA's motion for summary judgment, on the ground that the case was not ripe because TRPA had not ruled on the eligibility of another party to receive from Mrs. Suitum the transfer of development rights. App. C at 4. The court explained:

> Absent an application to transfer development, and a final decision on such application, we cannot know whether [Mrs. Suitum's] land indeed is unusable. Without a decision as to transfer rights of the property, the economic impact of the challenged regulation and the extent it interferes with [Suitum's] reasonable investment-backed expectation, cannot be assessed.

App. C at 4. Although TRPA had submitted evidence of the value of development rights, *see Suitum*, App. A at 11, the District Court concluded that these rights could not be valued absent an application to transfer them. App. C at 4.

E. The Ninth Circuit Held Mrs. Suitum's Takings Claim Was Not Ripe Because TRPA Had Not Determined Whether Another Landowner Could Use Her Development Rights

Mrs. Suitum timely appealed this judgment to the Ninth Circuit. In a published decision, the Ninth Circuit affirmed the judgment. The court below analogized the transferable development right process to the submission of a development plan or variance request, as "the TDR program effects the same purpose: facilitating alternative uses of the property." *Suitum*, App. A at 9. The court concluded that "transfer of development rights is a 'use' of SEZ property." *Id.*, App. A at 10.

The Ninth Circuit held that Mrs. Suitum's case is not ripe for review:

> Without an application for the transfer of development rights, TRPA is foreclosed from determining the extent of the use of Suitum's property.
>
> ....
>
> Without pursuit of the transfer of development rights, we cannot know whether the regulations have gone too far because at this point, no one knows how far the regulations have gone. ... Without attempting to transfer the rights she currently possesses, Suitum cannot know the "nature and extent of permitted development ... and thus cannot know the regulations' full economic impact."

Suitum, App. A at 9 (citations omitted).

The Ninth Circuit acknowledged that it already knew what development rights Mrs. Suitum could transfer, *Suitum*, App. A at 6, and it acknowledged that TRPA introduced evidence of the value of those rights. *Id.*, App. A at 11. Nonetheless, it required Mrs. Suitum's "pursuit" of the transfer of these rights, including an application for approval of the use of those rights by another landowner, before the court could determine the extent of development permitted on her land and the economic impact of TRPA's regulations on her property.

Mrs. Suitum timely filed a petition for rehearing, which was denied on May 13, 1996. App. B. She now files this petition for writ of certiorari, hoping that this Court will decide whether TRPA can, by inventing a device such as a transferable development rights program, avoid paying the just compensation *Lucas* entitles her.

REASONS FOR GRANTING THE WRIT

The *Williamson County* ripeness doctrines for cases under the Takings Clause often confound property owners,

land use law practitioners, and the courts.[10] The Ninth Circuit has compounded the confusion by its application of the final decision ripeness doctrine in this case. The court below requires Mrs. Suitum to apply for administrative approval of the use of transferable development rights by another landowner in order to ripen her takings claim. This holding severs the final decision ripeness requirement from its doctrinal underpinning--which is to allow courts to analyze takings claims in the context of a definitive determination of the extent of development allowed on the subject property. The Ninth Circuit has taken a doctrine that aims for certainty and rendered it uncertain, as there is no limit to the number of irrelevant procedures that a property owner may be forced to utilize.

In this case, the Ninth Circuit has held that a property owner may not challenge land use regulations under the Takings Clause even when she has an absolutely final decision precluding any development on her particular parcel of land. This decision could potentially nullify the *Lucas* categorical taking doctrine, as a government agency banning all productive use of real estate can shut the affected property owners out of court merely by contriving TDR programs. The court below based its holding on the assumption that the value of intangible rights cannot be appraised by a court

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[10] For a survey of the large body of cases grappling with these issues, *see, e.g.*, Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1 (1992); Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37 (1995); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995).

unless the owner of the rights actually sells them. This assumption conflicts with the normal legal practice in valuing assets, and conflicts in particular with the most recent decision of the Seventh Circuit on that issue. The Ninth Circuit's misunderstanding of the final decision doctrine, and its holding that transferable development rights must be sold in order to be valued by a court, have deprived a property owner of the ability to protect her constitutional rights in a judicial forum. This case raises an important issue for this Court to resolve, Supreme Court Rule 10(c), and conflicts with the reasoning of the Seventh Circuit on an important issue, Supreme Court Rule 10(a).

ARGUMENT

I

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO DECIDE IF THE TRANSFER OF DEVELOPMENT RIGHTS TO THIRD PARTIES IS A USE OF THE TRANSFEROR'S LAND FOR PURPOSES OF THE WILLIAMSON COUNTY FINAL DECISION RIPENESS DOCTRINE

The Ninth Circuit has held that Mrs. Suitum's transfer of development rights would be a "use" of her property, for purposes of the *Williamson County* final decision ripeness doctrine. *Suitum*, App. A at 10. This ruling departs from this Court's ripeness precedents, which define "use" of land as building on or development of land. *Williamson County*, 473 U.S. at 190; *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351-52 (1986). The Ninth Circuit's approach has the further consequence of threatening to nullify the *Lucas* per se takings rule, which holds that the denial of all beneficial or productive use of land is a violation of the Takings Clause. *Lucas*, 505 U.S. at 1015.

A. Transferable Development Rights Have No Relevance to the Final Decision Ripeness Doctrine, Which Serves the Purpose of Allowing the Court to Determine What Development Will be Allowed on a Property Owner's Land

The Court below based its decision that Mrs. Suitum's case was not ripe on the "final decision" ripeness doctrine, first expressly articulated in the *Williamson County* opinion, 473 U.S. at 186-91. *Suitum*, App. A at 8.

This doctrine was adopted by the Court for cases in which a property owner alleges that a regulation restricting development, as applied to his land, has an unconstitutional economic impact on his property. *Williamson County*, 473 U.S. at 191, 199. In order to assess this impact, courts must know the maximum extent of development that the government regulation will allow--a property owner needs to have "obtained a final decision regarding how it will be allowed to develop its property." *Id.* at 190.

This Court in *Williamson County* adopted the final decision doctrine after surveying unsuccessful takings claims. 473 U.S. at 186-88. In each case revisited by the Court, there was a possibility that some development would be allowed on the subject property. A "variance" or "waiver" could have been sought by the property owner in *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 297 (1981). *Williamson County*, 473 U.S. at 187. A "plan for development of their property" was not yet submitted in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). *Williamson County*, 473 U.S. at 187. The rejection of the building plan in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 136-37 (1978), did not foreclose the possibility that other proposed structures would be approved. *Williamson County*, 473 U.S. at 187.

The Court in *Williamson County* concluded that the amount of development allowed on a piece of property is the essential factor in challenges based on the economic impact

of regulations. 473 U.S. at 190. In that particular case, the owners had not applied for available variances. 473 U.S. at 188-89, 191. Thus, the case was not ripe for court review, as the government had not "arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 191.

This holding was reemphasized in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. at 351:

> Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.

The *MacDonald* Court considered whether "the denial of only one intense type of residential development," 477 U.S. at 352 n.8, satisfied the final decision ripeness doctrine. This Court described the necessary final decision as one "of the type and intensity of *development* legally permitted *on the subject property*." 477 U.S. at 348 (emphasis added). As there was "the possibility that some development will be permitted," the takings question was not yet ripe. 477 U.S. at 352.

There is no ambiguity concerning the amount of development that TRPA will allow on Mrs. Suitum's property. TRPA bans "additional land coverage or other permanent land disturbance" on Stream Environment Zone property. TRPA Code § 20.4, App. F at 4. The District Court expressly found that Mrs. Suitum "may not develop or build on the parcel of land she owns." App. D at 3. There were no variances or other procedures available to allow her to develop her land, as the transfer of development rights was "the only avenue not yet pursued." App. C at 2. Under *Williamson County*, 473 U.S. at 190 ("final decision regarding how it will be allowed to develop its property"), and *MacDonald*, 477 U.S. at 348 (final decision concerning "development legally permitted on the subject property"), Mrs. Suitum's case should have been ripe for court review.

The Ninth Circuit determined that Mrs. Suitum's case was not ripe by concluding that the transfer of development rights from her property to someone else's land is a "use" of her property. *Suitum*, App. A at 10. The court acknowledged that "in the more typical scenario" the necessary final decision is the result of "modified development plans or requests for variances." *Id.* at 9. In finding that the transfer of development rights "effects the same purpose" as variance or building plan applications, the court abandoned the very purpose of the final decision doctrine: to determine "the type and intensity of *development* legally permitted *on the subject property*." *MacDonald*, 477 U.S. at 348 (emphasis added). The court below *explicitly rejected* this rationale:

> That the possible uses under TRPA's unusual procedure are transfers of development rights *from* Suitum's property rather than, for example, reapplications of development plans *for* her property, is immaterial.

Suitum, App. A at 10 (emphasis in original). The Ninth Circuit cited no authority for the departure from this Court's ripeness precedents. *Id.*

B. The Lucas Per Se Takings Category Is in Jeopardy if Transferable Development Rights, Which Require "Permanent Retirement" of the Land from Which They Are Transferred, Are Considered a Use of the Transferor's Land

The Ninth Circuit's determination that the transfer of development rights to someone else's property is a "use" of the transferor's property, *Suitum*, App. A at 10, could nullify the *per se* category of Takings Clause violations expressly established by this Court in *Lucas*.

The *Lucas* opinion reaffirmed this Court's

> frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

505 U.S. at 1019 (emphasis added). A Takings Clause violation in such cases is "categorical," that is, "without case-specific inquiry into the public interest advanced in support of the restraint." *Id.* at 1015. When all "economically productive use" of land is forbidden, under *Lucas* the Takings Clause is violated unless the forbidden use could have been prohibited under common law nuisance doctrine. *Id.* at 1029.

Lucas focused on actual *use* of the land being regulated. The *per se* category of takings was defined as

> regulations that leave the owner of land without economically beneficial or productive options for its use--typically, as here, by requiring land to be left substantially in its natural state.

Lucas, 505 U.S. at 1018. This categorical violation of the Takings Clause is variously described as a denial of "all economically beneficial or productive use," *id.* at 1015, of "economically viable use," *id.* at 1016 (quoting *Agins*, 447 U.S. at 260), "of all economically feasible use," *id.* at 1016 n.7, and of "all economically valuable use," *id.* at 1028. Every way that it is described, at the heart of this concept is whether any activity can take place on the land that economically benefits the landowner.

Mrs. Suitum's case falls squarely within the *Lucas* category of *per se* Takings Clause violations. She "may not develop or build on the parcel of land she owns." App. D at 3. In short, she can make no use of it. In *Lucas*, this Court recognized that "the erection of any habitable or productive improvements" on one's land is "the essential use of land." 505 U.S. at 1031 (internal quotation marks and citation omitted). This essential use has been denied Mrs. Suitum, yet the Ninth Circuit has held her case unripe.

This holding could eviscerate the *Lucas* categorical taking doctrine. If the transfer of a development right is a "use" of land, then *all* use of land is not denied whenever the regulatory body fabricates a TDR program. Government can simultaneously freeze someone's property as open space but provide to her in return "new rights" that are transferable--"rights" that can take any form, even a "coupon" entitling the recipient to a discounted application fee. Under the Ninth Circuit's holding, although the property owner would be forbidden from using her land, her legal challenge to the regulation is delayed indefinitely while she tests the marketability of each and every new transferable right.

In Mrs. Suitum's case, in order to transfer her development rights she must "permanently retire" her parcel. TRPA Code §§ 20.3.C(7)(a), App. F at 3; 34.2.B, App. F at 7; 34.5.A, B, H, App. F at 10. Thus, her land must "be left substantially in its natural state"--the prototypical *Lucas per se* taking. *Lucas*, 505 U.S. at 1018. Under *Lucas*, Mrs. Suitum would automatically be entitled to just compensation. But instead of determining how much money TRPA owes Mrs. Suitum, the Ninth Circuit has banished her claim from the courtroom.

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS OVER WHETHER A PROPERTY OWNER MUST FIND SOMEONE TO BUY A PROPERTY INTEREST IN ORDER FOR THE COURT TO DETERMINE THE EXTENT OF THE ECONOMIC IMPACT OF A REGULATION ON HER LAND

The Ninth Circuit requires that Mrs. Suitum find third parties willing to buy her transferable development rights before the court will consider her takings claim ripe. *Suitum*, App. A at 9. The court below justifies this requirement by deeming it necessary for determining the "full economic impact" of the TRPA regulations that Mrs. Suitum seeks to challenge. *Id.* This deviation from this Court's final decision ripeness precedents conflicts with the Seventh Circuit's decision in *Marusic Liquors, Inc. v. Daley*, 55 F.3d 258, 260-61 (7th Cir. 1995). This Court should issue a writ of certiorari to settle this conflict and decide whether a property owner must find potential purchasers of a property interest before a takings claim can be held ripe for adjudication.

A. Even if TRPA's Creation of Transferable Rights Constitutes a "Permitted Use" of Mrs. Suitum's Property, the Nature and Extent of That "Use" Has Been Fully Established, Thereby Satisfying Williamson County's Final Decision Ripeness Doctrine

As detailed in Section I.A., *supra*, the final decision ripeness doctrine requires that property owners obtain from a regulatory body,

> a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Williamson County, 473 U.S. at 191.

A property owner making an as-applied takings challenge, based on the economic impact of a regulation, must bring to the court a "final and authoritative determination" from the government of the "type and intensity" or "nature and extent" of development permitted on her land under the challenged regulation. *MacDonald*, 477 U.S. at 348, 351.

The Ninth Circuit has termed the transfer of development rights to be a "use" of Mrs. Suitum's land, and has concluded:

> Without an application for the transfer of development rights, TRPA is foreclosed from

> determining the extent of the use of Suitum's property.

Suitum, App. A at 9.

Although petitioner contends that a transfer of development rights is not a use of the transferor's land, *see* Section I.A., *supra*, even if it were a "use," the "nature and extent" of this use is not at all uncertain. Under TRPA's Code of Ordinances, Mrs. Suitum possesses the following transferable rights:

1. Land coverage of 183 square feet. *Suitum*, App. A at 6; TRPA Code §§ 20.3.A, App. F at 1; 20.3.C(2)(c), App. F at 2.

2. One residential development right, TRPA Code § 34.2, App. F at 7, plus three residential bonus units for retiring Stream Environment Zone property, TRPA Code § 35.2.D, App. F at 11.

These rights are defined in the TRPA Code. They are not dependent on TRPA's approval, but depend on objective facts already established: Mrs. Suitum's parcel is vacant, *see* TRPA Code § 34.2.A, App. F at 7 (parcel transferring residential development right must be vacant); TRPA has determined that Mrs. Suitum's parcel is in a Stream Environment Zone, *see* TRPA Code § 35.2.D, App. F at 11 (retired land in Stream Environment Zone can transfer 3 bonus units); and Mrs. Suitum's lot is 18,300 square feet in size, *see* TRPA Code § 20.3.A, App. F at 1 (base land coverage is 1% of lot size for Stream Environment Zones).

The third transferable development right she does not have. Mrs. Suitum must enter and win a lottery in order to receive an allocation. Barnett Aff. at ¶ 11.

The TRPA approval process that the Ninth Circuit requires Mrs. Suitum to go through is *not approval to market the TDRs*. The application that must be submitted is an approval form for *the actual transfer to* the receiving parcel which must already be identified. App. G at 1-3 (Transfer Approval Form). The process is irrelevant to the

determination of the development rights Mrs. Suitum possesses, and instead determines whether the designated recipients of these rights may use them to develop their own land.

Under *Williamson County*, 473 U.S. at 190, and *MacDonald*, 477 U.S. at 348, Mrs. Suitum's takings claim is ripe even if TDRs are a "use" of her property, as the extent, nature, and type of these rights has been conclusively determined. The Ninth Circuit admitted that these rights are already known, in a self-contradictory statement:

> Without attempting to transfer *the rights she currently possesses*, Suitum cannot know the nature and extent of permitted development
> ....

Suitum, App. A at 9 (emphasis added) (internal quotation marks and citation omitted). If "permitted development" means the transfer of development rights, then the "nature and extent" of these rights has been definitively established.

B. The Final Decision Ripeness Doctrine Is Satisfied When the Economic Impact of the Regulation on the Subject Property Is Established--Regardless of Whether an Actual Market Transaction Has Occurred

If a regulation does not deny all beneficial use of a landowner's property--is not in the *Lucas per se* takings category--it can still violate the Takings Clause. This Court, in the *Penn Central* opinion, set forth a number of factors to be considered on an "ad hoc" basis to determine if a regulation violates the Takings Clause, including its "economic impact," and the "extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124.

The final decision ripeness requirement was developed in light of those two *Penn Central* factors, on the reasonable assumption that reviewing courts are capable of evaluating "the economic impact of the challenged action and

the extent to which it interferes with reasonable investment-backed expectations." *Williamson County*, 473 U.S. at 191. In the decision below, however, the Ninth Circuit held that the value of Mrs. Suitum's remaining property interests could not be determined absent a fully consummated third-party market transaction:

> Without attempting to transfer the rights she possesses, Suitum cannot know the nature and extent of permitted development, ... and thus cannot know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed expectations.

Suitum, App. A at 9 (citation omitted).

There is no basis in either logic or law for the Ninth Circuit's holding that the economic value of Mrs. Suitum's transferable development rights cannot be determined unless she finds someone to buy them. Determining the value of TDRs is no different from determining the value of any other tangible or intangible asset. Such valuations are performed by the courts, without an actual transaction, all the time--based on expert testimony concerning appraised values. *See, e.g., Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 903 (Fed. Cir. 1986) (existence of speculative market for overregulated property was established and should be considered by trial court in determining merits of takings claim). Indeed, the Ninth Circuit acknowledged in this very case that the trial court accepted testimony on the value of these TDRs submitted by TRPA. *Suitum*, App. A at 10-11. Yet it held that Mrs. Suitum's claim was not ripe because her transferable development rights must be sold in order to be valued! *Suitum*, App. A at 9.

Williamson County's final decision ripeness doctrine is satisfied when the economic impact of the regulation on the subject property is established. Here, the value of both Mrs. Suitum's land *and* TRPA's fabricated development rights could be fully determined at the time Mrs. Suitum

filed her takings claim, without recourse to a third party market transaction. The decision below adds an additional, unnecessary step that has never before been required to establish a ripe takings claim under *Williamson County*. Mrs. Suitum's claim was ripe and should have been adjudicated.

C. The Seventh Circuit Held in the Marusic Liquors Case That the Final Decision Ripeness Doctrine Does Not Require That a Property Owner Attempt to Transfer a Property Interest in Order for the Court to Assess the Economic Impact of a Regulation on That Interest

In addition to conflicting with ordinary legal practice concerning the valuation of assets, the decision below conflicts with the most recent case from the Seventh Circuit considering the issue, *Marusic Liquors, Inc. v. Daley*, 55 F.3d at 260. In *Marusic Liquors*, a property owner was confronted with the argument that his takings challenge to a regulation affecting an intangible right created by the government--a liquor license--was unripe because he had not attempted to sell his business. *Marusic Liquors*, 55 F.3d at 260. The Seventh Circuit held that the case was ripe under the final decision doctrine of *Williamson County*. *Id.* at 261.

Marusic Liquors reviewed an ordinance that placed restrictions on the transfer of liquor licenses in certain Chicago neighborhoods--nonrelatives could acquire no more than a 5% interest in such businesses each year. 55 F.3d at 260. The District Court dismissed the case, "ruling that the claims are unripe because Marusic has no immediate plan to sell the business." *Id.*

The Seventh Circuit reversed, expressly finding the case ripe under *Williamson County* even though the owner had not attempted to sell his license. 55 F.3d at 261. The Court held that "the ordinance itself embodies a conclusive decision about transferability" that had immediate impact on the value of the business even though it was "an open

question whether, and if so when, Marusic will try to sell the store." *Id.*

The provisions of the TRPA Code of Ordinances creating the development rights program similarly "embod[y] a conclusive decision about transferability." These provisions define the rights that Mrs. Suitum has available for transfer. TRPA Code §§ 20.3.A, App. F at 1; 20.3.C(2)(c), App. F at 2; 34.2, App. F at 7; 35.2.D, App. F at 11. Under the final decision doctrine of *Williamson County*, 473 U.S. at 191, TRPA has reached "a final, definitive position" concerning the existence of Mrs. Suitum's development rights. The Ninth Circuit and the Seventh Circuit are in conflict over whether Mrs. Suitum has a ripe takings claim. This Court should grant the petition for writ of certiorari to resolve this conflict.

CONCLUSION

Bernadine Suitum has received a final, definitive decision from TRPA on the uses to which she can put her land: there are none. This Court's decision in *Lucas v. South Carolina Coastal Council* affirmed that when a regulation "denies all economically beneficial or productive use of land," this action is a "categorical" violation of the Takings Clause. 505 U.S. at 1015.

But despite TRPA's final decision prohibiting Mrs. Suitum from building anything on her property, the Ninth Circuit ruled that her takings claim was not ripe for adjudication.

The Ninth Circuit opinion in this case refuses jurisdiction over a ripe constitutional claim, undermines the *Lucas* decision, and creates a conflict with the Seventh Circuit. Whether the sale of transferable development rights is a use of the seller's property, and whether these rights must be sold in order to be valued by a court, are critical questions that will determine if property owners can protect

their constitutional rights in a judicial forum. Petitioner respectfully urges this Court to grant this petition for writ of certiorari to decide these important issues and resolve the circuit conflict.

DATED: August, 1996.

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERNADINE SUITUM,	)	
	)	No. 94-15768
Plaintiff-Appellant,	)	
v.	)	D.C. No.
	)	CV-91-040-ECR
TAHOE REGIONAL	)	
PLANNING AGENCY,	)	**OPINION**
	)	
Defendant-Appellee.	)	

Appeal from the United States District
Court for the District of Nevada
Edward C. Reed, District Judge, Presiding

Argued and Submitted
November 13, 1995--
San Francisco, California

Filed: April 1, 1996.

Before: Mary M. Schroeder and
Arthur L. Alarcon, Circuit Judges,
and Owen M. Panner,* District Court Judge

Opinion by Judge Panner

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* Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.

SUMMARY

Individual Rights/Constitutional Rights/Real Estate

The court of appeals affirm a district court judgment. The court held that a property owner's claim that an agency committed an unconstitutional taking when it refused to permit her to build a home on her residential lot was unripe, where the owner had not applied for a transfer of her development rights through an available program.

A 1987 plan (Plan), which was drafted pursuant to the 1980 Tahoe Regional Planning Compact, included an Individual Parcel Evaluation System (IPES), under which appellee the Tahoe Regional Agency (TRPA) assigned a numerical score to a residential lot depending on its relative environmental suitability for development. The TRPA annually established a numerical IPES level enabling owners of parcels with IPES scores above a certain level to seek building permits. The Plan also created Stream Environment Zones (SEZs) and allowed no new land coverage or other permanent land disturbance with SEZs, except for certain limited public uses. The Plan established criteria that a property owner had to meet before building a single-family residence.

The Transfer of Development Rights (TDR) program allowed for transfers of land coverage, residential development rights, and residential allocations. For property within a SEZ, the property owner could transfer one percent of the total property area. Subject to county approval and the receiving parcel's use and density eligibility, residential development rights could be transferred anywhere in the Lake Tahoe Basin. Property owners were allowed to transfer a residential allocation from a parcel with a low IPES score to any parcel that had an IPES score above the annual IPES level.

Appellant Bernadine Suitum owned property located in a SEZ in the Basin. Suitum had one residential development right and 183 square feet of land coverage available to transfer. She did not apply for another residential allocation or to transfer her residential development right or available land coverage under the TDR program. Suitum brought a civil rights action against the TRPA, alleging that it committed an unconstitutional taking and violated her substantive due process and equal protection rights when it refused to permit her to build a home on her residential lot. The district court granted summary judgment to the TRPA, concluding that Suitum's claims were unripe. Suitum appealed.

[1] The "final decision requirement" required Suitum to show that before filing suit, she sought a final decision from the TRPA in regard to the application of the regulation to the property. **[2]** Suitum had to apply for the transfer of her development rights through the TDR program before her claim would be ripe. **[3]** Without an application for the transfer of development rights, the TRPA was foreclosed from determining the extent of the use of her property. **[4]** Without pursuit of the transfer of development rights, it could not be known whether the regulations went too far; no one knew how far the regulations went. Without attempting to transfer the rights she possessed, Suitum could not know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed expectations. **[5]** Within the unique TRPA regulatory scheme, transfer of development rights was a "use" of SEZ property.

[6] The district court did not abuse its discretion in excluding from ripeness analysis an affidavit from a former TRPA staff member familiar with TRPA ordinances and application procedures for transfer of development commodities. **[7]** The specific issue on which expert testimony was relevant was the value of Suitum's transfer of development rights. The former staff member was not an appraiser. **[8]**

Given that Suitum's development rights possessed significant value, she failed to meet her burden of showing that participation in the TDR program was futile.

[9] Compliance with the final decision process is required to establish a ripe claim, even where it is apparent that the process will not provide the same value that the landowner may have had absent the impacting regulations.

COUNSEL

William Patterson Cashill, Reno, Nevada, for the plaintiff-appellant.

J. Thomas Susich, Vicki E. Hartigan, Crowell, Susich, Owen & Tackes, Carson City, Nevada, for the defendant-appellee.

OPINION

PANNER, District Judge:

In this 42 U.S.C. S 1983 action, Bernadine Suitum alleges that the Tahoe Regional Planning Agency (TRPA) committed an unconstitutional taking and violated her rights to substantive due process and equal protection when it refused to permit her to build a home on her residential lot in the Lake Tahoe Basin. The district court concluded that Suitum's claims were unripe and granted summary judgment to TRPA. We affirm.

BACKGROUND

I. TRPA

TRPA was created in 1969 by the Tahoe Regional Planning Compact. Pub. L. 91-148, 83 Stat. 360; Cal Gov't Code § 66801; Nev. Rev. Stat. § 277.200 (1969 Compact); *amended*, Pub. L. 96-51, 94 Stat. 3233; Cal Gov't Code § 66801; Nev. Rev. Stat. § 277.200 (1980 Compact). We have previously detailed TRPA's background and it need not be repeated here. *See, e.g., People of Calif. v. Tahoe Regional Planning Agency*, 766 F.2d 1308, 1310-1312 (9th Cir.), *amended*, 775 F.2d 998 (9th Cir. 1985).

II. The 1987 Plan

The 1987 Plan, drafted pursuant to the 1980 Compact, governs development of Suitum's property and includes the Individual Parcel Evaluation System (IPES) under which TRPA assigns a numerical score to a residential lot depending on its relative environmental suitability for development. *See Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1320 (D. Nev. 1992)(listing relevant environmental criteria). TRPA annually establishes a numerical IPES level enabling owners of parcels with IPES scores above the stated level to seek building permits. Owners of parcels with IPES scores below that level may proceed with development only if the level is lowered. *Id.*

The 1987 Plan also creates Stream Environment Zones (SEZs) which generally convey surface water from upland areas into Lake Tahoe and its tributaries. The 1987 Plan allows no new land coverage or other permanent land disturbance within SEZs, except for certain limited public uses.

Finally, the 1987 Plan establishes four criteria that the property owner must meet before building a single-family residence: (1) an IPES score above the numerical level established for development in that calendar year; (2) a residential development right; (3) adequate land coverage; and (4) a residential allocation.

III. Transfer of Development Rights

The Transfer of Development Rights (TDR) program is "an elaborate system of transfers of development rights[,]" *id.*, which allows for transfers of land coverage, residential development rights, and residential allocations. A property owner may transfer land coverage to a receiving parcel within the same hydrologic zone allowing for construction of a larger project on the receiving parcel. For property within a SEZ, the property owner is allowed to transfer one percent of the total property area. For example, Suitum's property is approximately 18,300 square feet. Because it is located in a

SEZ, she is allotted 183 square feet of land coverage to transfer to another parcel.

Subject to county approval and the use and density eligibility of the receiving parcel, residential development rights may be transferred anywhere in the Lake Tahoe Basin. Property owners may transfer a residential allocation from a parcel with a low IPES score to any parcel with an IPES score above the annual IPES level.

IV. Development of Suitum's Property Under the 1987 Plan

Suitum purchased the property in 1972 and first attempted development of the lot in 1989 when she obtained a residential allocation from Washoe County for the construction of a house. After a field verification, TRPA initially determined that the property was entirely located in a SEZ and then assigned it a zero IPES score. Suitum appealed. TRPA upheld the IPES score on the basis that the lot was located in a SEZ.

Suitum has one residential development right and 183 square feet of land coverage available to transfer. Although she obtained a residential allocation in 1989, she did not use it that year and it reverted back to the county. Suitum has not applied for another residential allocation. Suitum has not applied to transfer her residential development right or available land coverage under the TDR program.

DISCUSSION

I. Standard of Review

A grant of summary judgment is reviewed de novo. *Han v. Mobil Oil Corp.*, No. 94-55373, slip op. 15379, 15382, 1995 WL 728210 at *1 (9th Cir. Dec. 11, 1995). Our review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). *Id.* at 15383. We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

II. General Taking Claim Standards

A regulatory taking in violation of the Fifth Amendment, such as that alleged by Suitum, occurs if the regulation "denies an owner economically viable use of his land." *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 473 (9th Cir. 1994). "[T]he term 'economically viable use' has yet to be defined with much precision." *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 616 (9th Cir. 1993). However, "the existence of permissible uses generally determines whether a development restriction denies a property holder the economically viable use of its property." *Id.* The regulation's economic impact and the extent to which it interferes with investment-backed expectations are relevant to the inquiry. *Penn Cent. Transport Co. v. City of New York*, 438 U.S. 104, 124 (1978). In sum, "determining whether a regulatory action effects a taking requires complex factual assessments of the purposes and economic effects of government actions[.]" *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 685 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 924 (1994).

II. Ripeness Requirements for As-Applied Claims

A. Ripeness

[1] An "as applied" challenge is "a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation." *Carson Harbor*, 37 F.3d at 474. We have previously noted that there are "two independent hurdles to the filing of a [regulatory] taking claim in federal court against a state or local government." *Id.* (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985)). Only the first, known as the "final decision requirement," is at issue in this case and it requires Suitum to show that before filing suit, she sought a "final decision from [TRPA] regarding the application of the regulation to the property at issue." *Carson Harbor*, 37 F.3d at 474.[1]

We recently explained that finality "helps the court evaluate whether regulation of the subject property is excessive by identifying the extent of the regulation." *Dodd v. Hood River County*, 59 F.3d 852, 858 (9th Cir. 1995). The court cannot "determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Kinzli*, 818 F.2d at 1453 (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986)).

[2] We have not previously discussed the effect of a transfer of development rights on a regulatory taking claim. However, Judge Fletcher has made clear, in dicta, that she

---

[1] These ripeness requirements are equally applicable to the due process and equal protection claims. *See Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1231-32 (9th Cir.) (substantive due process), *cert. denied*, 115 S. Ct. 193 (1994); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455-56 (9th Cir.)(equal protection and substantive due process), *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).

would require pursuit of transfer of development rights before a regulatory taking claim against TRPA could be considered ripe. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1344 n.3 (9th Cir. 1990)(Fletcher, J. concurring), *cert. denied*, 499 U.S. 943 (1991). As explained below, we agree with Judge Fletcher, and the district court, and conclude that Suitum must apply for the transfer of her development rights through the TDR program before her claim is ripe.

[3] Without an application for the transfer of development rights, TRPA is foreclosed from determining the extent of the use of Suitum's property. *Dodd*, 59 F.3d at 858. By failing to apply to the TDR program, Suitum denies TRPA the ability to grant a "different form[] of relief ... which might abate the alleged taking." *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir.), *cert. denied*, 502 U.S. 498 (1990).

[4] Without pursuit of the transfer of development rights, we cannot know whether the regulations have gone too far because at this point, no one knows how far the regulations have gone. *MacDonald*, 477 U.S. at 348. Without attempting to transfer the rights she currently possesses, Suitum cannot know the "nature and extent of permitted development[,]" *Kinzli*, 818 F.2d at 1453, and thus cannot know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed expectations, two critical components of a regulatory taking claim analysis. *Youpee v. Babbitt*, 67 F.3d 194, 197 (9th Cir. 1995).

[5] Although in the more typical scenario a plaintiff may face a municipal planning board which reviews modified development plans or requests for variances, here, the TDR program effects the same purpose: facilitating alternative uses of the property. We recognize that TRPA's regulatory scheme is unique and conclude that within that scheme, transfer of development rights is a "use" of SEZ property. The key inquiry is whether the property retains "any

reasonable beneficial use[.]" *MacDonald*, 477 U.S. at 349. That the possible uses under TRPA's unusual procedure are transfers of development rights *from* Suitum's property rather than, for example, reapplications of development plans *for* her property, is immaterial.

B. Futility Exception

We recognize a "limited" futility exception to the ripeness doctrine. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990). Generally, the final decision requirement is excused if the plaintiff shows that it would be an "idle and futile act" or that the application procedures are unfair. *Kinzli*, 818 F.2d at 1454, 1455; *Del Monte Dunes*, 920 F.2d at 1496 (plaintiff's burden).

Suitum argues that her claims are ripe because the TDR program is a "ruse, a sham." She contends that the TDR program has produced no sales and that her property has no marketable development rights. In support of her argument, she relies on the affidavit of her expert, Paul Kaleta, a former TRPA staff member who is now a private consultant and who is familiar with TRPA ordinances and application procedures for transfer of development commodities.

In support of its contention that pursuit of transfer of development rights under the TDR program is meaningful, TRPA relies on the affidavit of Certified Appraiser Stephen R. Johnson who has twenty-four years of appraising experience in the Lake Tahoe area. He attests that Suitum's development rights have value.

1. Exclusion of Kaleta's Affidavit

[6] The district court concluded that there is significant value in the transfer of residential development rights and transfer of residential allocations. In reaching this conclusion, the district court disregarded Kaleta's affidavit and relied only on the valuation evidence submitted by TRPA. We conclude that the district court did not abuse its discretion in

excluding Kaleta's affidavit from the court's ripeness analysis.

We review "a district court's decision to admit or exclude expert testimony for an abuse of discretion." *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 841 (9th Cir. 1995). "Generally, a district court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous view of the facts." *Id.*

[7] Suitum contends that Kaleta's experience as a TRPA regulator qualifies him to testify as to the value of her development rights. To offer an expert opinion, Kaleta must possess the required knowledge, skill, experience, training, or education. Fed. R. Evid. 702. The specific issue on which expert testimony is relevant is the value of Suitum's transfer of development rights. It was not a clear error of judgment for the district court to conclude that a licensed appraiser or someone with demonstrated experience in *valuation* was the proper expert on this issue. Kaleta is not an appraiser either by experience, education, or other training. His experience in facilitating property owners in TDR program transfers is not equivalent to experience in assigning a market value to TRPA development rights. The district court's exclusion of Kaleta's affidavit was not an abuse of discretion.

[8] TRPA's evidence shows that without an allocation right, Suitum's development rights are valued from $10,000 to $21,500 or more. With an allocation right, the value increases by approximately $30,000. Given that Suitum's development rights possess some significant value, Suitum fails to meet her burden of showing that participation in the TDR program is futile. Thus, her application to the TDR program is required to present ripe taking, equal protection, and substantive due process claims to the court.

Finally, we reject Suitum's suggestion made at oral argument that because the TDR program is not designed to give her just compensation, she need not participate in it to demonstrate ripeness. In the regulatory taking analysis, a taking must be established before the question of just

compensation arises. The object of the final decision requirement is to determine whether a taking has occurred at all, independent of any compensation issue, by examining the extent of the regulations' economic impact and interference.

[9] Pursuit of a final decision in general, and application to the TDR program in particular, may mitigate the regulations' economic effect and result in a diminution in value rather than a more severe economic impact. The imposition of regulatory ordinances that merely diminish the value of property does not constitute a taking. *See, e.g., William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (diminution of property value from $2 million to $100,000 not a taking), *cert. denied*, 445 U.S. 928 (1980). Therefore, compliance with the final decision process is required to establish a ripe claim, even when it is apparent that the process will not provide the same value that the landowner may have had absent the impacting regulations. Because Suitum failed to apply for transfers of development rights through the TDR program and fails to demonstrate that such an application would be futile, her claims are unripe for adjudication.

III. TRPA's Request for Attorney's Fees on Appeal

Pursuant to 42 U.S.C. § 1988, TRPA asks for attorneys' fees for defending this appeal. We may award attorneys' fees under section 1988 to the prevailing party for fees on appeal. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1213 (9th Cir. 1986), *amended* 808 F.2d 1373 (9th Cir. 1987). We reject TRPA's request for fees. Suitum's claim was not frivolous or groundless and fees are inappropriate under the circumstances. *See Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (court may award section 1988 fees when the claim is "frivolous, unreasonable, or groundless").

AFFIRMED.

APPENDIX B Filed 5/13/96
NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERNADINE SUITUM,	)	
	)	
Plaintiff-Appellant,	)	No. 94-15768
v.	)	D.C. No. CV-91-040-ECR
	)	
TAHOE REGIONAL	)	
PLANNING AGENCY,	)	ORDER
	)	
Defendant-Appellee.	)	

Before: SCHROEDER and ALARCON, Circuit Judges, and PANNER,* District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM,
Plaintiff,

CV-N-91-040-ECR

v.

ORDER

TAHOE REGIONAL
PLANNING AGENCY; and
STATE of NEVADA,
Defendants.

_____ /

This case involves a takings claim by plaintiff Suitum, the owner of a single-family residential lot in Incline Village, Washoe County, Nevada, classified as stream environment zone (SEZ), to recover damages because she is not allowed to build a residence on the property. Plaintiff has appealed the score of her lot under the Individual Parcel Evaluation System (IPES) but has not attempted to transfer development rights from the parcel at issue to another parcel under the transfer development plan created by Tahoe Regional Planning Agency (TRPA).

Defendants filed a motion for summary judgment (document #66) arguing, in part, that this Court has no jurisdiction over this action because plaintiff's claim is no ripe. Specifically at issue is the fact that plaintiff has failed to apply to TRPA to transfer development rights from her property. It is argued therefore, that plaintiff has not pursued the key avenue of relief for one owning SEZ land in the Lake Tahoe Basin.

This Court ordered that the parties submit supplemental briefs regarding the procedures, prerequisites, and value of the transfer of development rights as applicable in this case so that the Court could determine if the only avenue not yet pursued was a application for a meaningful use of the property (Order dated November 23, 1993 document #71). The parties submitted briefs and additional affidavits on the issue.[1] The briefing on this issue was completed on February 28, 1994 and the Court addresses the issue in this expedited order.

Ripeness of a claim governs the power of a federal court to act in a takings case. This Court does not have subject matter jurisdiction unless the claim is ripe. *Macdonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1456-57 (9th Cir. 1987) *modified*, 830 F.2d 968 (9th Cir. 1987) *cert. denied*, 484 U.S. 1043 (1988).

An essential prerequisite to a regulatory takings claim is the final and authoritative determination of the type and

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[1] The affidavit of Paul Kaleta is inadequate under FRCP 56(e) and is disregarded by the Court. There is no showing that Mr. Kaleta is an expert. In order for opinions and conclusions to be transformed into evidence admissible at trial such opinions and conclusions must be offered by a qualified expert. A witness may be qualified as an expert by knowledge skill, experience, training or education...: FRE 702. While Mr. Kaleta's affidavit is full of opinions and conclusions as to the value of Plaintiff's development rights, he is not neither licensed nor certified as a real estate appraiser in the State of Nevada nor has he recited any knowledge, skill, experience, training or education which would qualify him to testify as an expert as to the valuation of development rights with which this Court is concerned.

intensity of use legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. *Macdonald, Sommer & Frates v. Yolo County*, at 348.

As things now stand, there is no final decision as to how plaintiff will be allowed to use her property. *See Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190-191 (1985). The Court is convinced that the transfer rights are significant to the takings calculus. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978); *American Savings & Loan v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981) (recognizing that transferable development rights mitigate financial burdens of zoning regulations and must be considered when considering the economic impact of a regulation). The briefing and affidavits presented to the Court on the issue illustrates that the transfer of development rights program created by TRPA is specifically designed to give relief to owners of SEZ properties. The finality, in terms of allowed use of the property, may only be determined after plaintiff applies to transfer her development rights. The specific examples of sales of rights in the past demonstrates there is significant value in the transfer of residential development rights and transfer of residential allocations which plaintiff may be entitled to. In fact, an application for transfer is the only "meaningful application" that can be made once property is determined to be SEZ. *See Kinzli* 818 F.2d at 1454-1455. In addition, there may be significant residual value as an adjunct to the transfer remedies.

The determination that the application for transfer rights is necessary before the takings claim in the case at hand can be considered ripe also comports with the other cases holding that pursuit of transfer rights is among the list of things that must be pursued in order for a takings claim to be ripe. *See Tahoe Preservation v. Tahoe Regional Planning*, 638 F.Supp. 126, 132-133 &n.6 (D.Nev. 1986) *vacated in part on other grounds*, 911 F.2d 1331 (9th Cir.

1990), *cert. denied* 111 S.Ct. 1404 (1991); *Tahoe Sierra Preserv. v. Tahoe Reg. Planning Agency*, 911 F.2d 1331, 1334 n.3 (Fletcher J., concurring), *cert. denied*, 111 S.Ct. 1404 (1991); *Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316 (D.Nev. 1992).

Absent an application to transfer development, and a final decision on such application, we cannot know whether plaintiff's land indeed is unusable. Without a decision as to the transfer rights of the property, the economic impact of the challenged regulation and the extent it interferes with plaintiff's reasonable investment-backed expectation, cannot be assessed. *Id.* Suitum's takings, substantive due process and equal protection claims are not ripe for consideration by this court. Plaintiff may not take her claims to trial without applying to transfer her development rights. TRPA's endeavor to do equity to SEZ holders would be rendered utterly meaningless. Moreover, until values attributable to the transfer program are known, the court cannot realistically assess whether and to what extent TRPA's regulations have frustrated plaintiff's reasonable expectations.

Plaintiff's claims are not ripe and this Court does not have jurisdiction over this action.

IT IS THEREFORE HEREBY ORDERED that TRPA's Motion for Summary Judgment (document #66) is GRANTED on all claims. The Clerk shall enter judgment accordingly.

IT IS FURTHER ORDERED that Plaintiff's Cross Motion for Summary Judgment (document #68) is MOOT.

IT IS FURTHER ORDERED that Defendant's Motion for Protective Order Striking Supplement to Answers

to Interrogatories and for Expenses (document #78) is DENIED. The affidavit of Paul Kaleta and the Court's reliance thereon is addressed in this order at N.1.

DATED: March 30th 1994.

s/s EDWARD C. REED
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM, CV-N-91-040-ECR

Plaintiff,
v.

ORDER

TAHOE REGIONAL
PLANNING AGENCY; and
STATE of NEVADA,
Defendants.
_____ /

Plaintiff Bernadine Suitum alleges that the regulations adopted and implemented by the Tahoe Regional Planning Agency (TRPA) have resulted in a taking of her single-family residential lot in Incline Village without just compensation and due process of the law in violation of the Fifth and Fourteenth Amendments to the United States Constitution. In addition, plaintiff alleges that TRPA's action in this matter constitutes a violation of substantive due process and a denial of equal protection in violation of the Fifth and Fourteenth Amendments. Plaintiff also seeks reimbursements for property taxes and special assessments made on the property. Defendant has moved for summary judgment on all claims (document #69).

Plaintiff has owned the lot at issue since 1972 and became interested in building a single-family home on her lot and obtained a residential allocation for the construction of a house on her lot from Washoe County in 1989. Plaintiff's property is located on what is known as a "Stream

Environment Zone" (SEZ).[1] Such zones are subject to a non-degradation (and restoration) standard due to the integral function they serve in the cleansing of runoff and the achievement of regional water quality goals and standards.[2] The relevant regulation affecting plaintiff's ability to build is TRPA's 1987 Regional Plan. The plan allows no new land coverage or other permanent land disturbance within stream zones, with very limited exceptions such as for public outdoor recreation facilities and certain public service facilities.

The Individual Parcel Evaluation System (IPES) excludes SEZ's from evaluation or alternatively mandates a score of zero (i.e. a prohibition of new land coverage.)[3] However, under the 1987 Plan, owners of property with a residential development right may transfer such right to another parcel. Plaintiff has not applied to TRPA to transfer from her parcel to another parcel either a residential dwelling unit, land coverage or a development allocation. Defendants claim that the fact that plaintiff has not applied for such a transfer of development rights precludes her from alleging a takings claim at this juncture for lack of ripeness.

With regard to the claim for reimbursement of fees, taxes and assessments (Fifth Claim for Relief) Plaintiff

---

[1] Plaintiff does not argue this categorization.

[2] The parties and Court are well aware of the history, purposes and functions of the TRPA and the interstate compact; it is therefore unnecessary to chronicle these subjects in this order. *See Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1319-1320 (D.Nev. 1992).

[3] It is uncontested that Plaintiff appealed her parcel evaluation (a score of zero) which prohibited her from building on her lot.

acknowledges that TRPA is not the correct defendant for this claim and the action is dismissed. However, with regard to the remaining claims the threshold issue of ripeness must be decided before proceeding further. The Court is unable to make such a determination of ripeness with the information before it. The only issue in this case is whether or not plaintiff must pursue her development transfer rights in order to present a ripe claim to this Court. The briefings by the parties do not make clear what these rights are or the procedures for obtaining such rights.

The Court understands that plaintiff may not develop or build on the parcel of land she owns and that no developmental rights may be transferred *to* the property at issue. While Defendants correctly assert that the courts have previously listed the application for transfer of development rights as a prerequisite to stating a ripe takings claim, such a prerequisite has always been listed among other avenues that had not yet been pursued by plaintiffs or in our dicta. *See Tahoe Preservation v. Tahoe Regional Planning*, 638 F.Supp. 126, 132-133 & n.6 (D.Nev. 1986), *vacated in part on other grounds*, 911 F. 2d 1331 (9th Cir. 1990), *cert. denied* ___ U.S. ___, 111 S.Ct. 1404 (1991); *Tahoe Sierra Preserv. v. Tahoe Reg. Planning Agency*, 911 F.2d 1331, 1334 n.3 (Fletcher J., concurring), *cert. denied* ___ U.S. ___, 111 S. Ct. 1404 (1991); *Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316 (D.Nev. 1992); *Tahoe Sierra Preservation Coun. v. Planning Agency*, 808 F. Supp. 1474, 1483 (D.Nev. 1992) *appeal pending* Ninth Circuit Docket No. 93-15113.

In this case the Court is concerned because the transfer of rights is the *only* avenue not yet pursued, the plaintiff cannot transfer any rights *to* the property at issue, and there is no evidence of any property appropriate for such transfer. There is also a question as to exactly what rights may be transferred in this case and what benefit or value

there is to a transfer. The only development right known to this Court is the allocation right granted by Washoe County.

Defendants claim that an application for transfer is the only "meaningful application" that can be made in this case. This Court would like the "meaningfulness" of this application explained. The question of whether or not a transfer of development rights constitutes a "use" of property can then be determined. An explanation as to how plaintiff can pursue the right to transfer development and how that is meaningful to the use of the property at issue is necessary. The dicta of the numerous cases aside, the Court requests that the parties address this issue specifically in briefs explaining what development rights can be transferred in plaintiff's case and the procedures, prerequisites and value of such transfer as applicable in this case.

IT IS THEREFORE HEREBY ORDERED that the parties shall file concurrent briefs on the issue of the transfer of development rights as applicable in this case (and described in the paragraph above) by December 8, 1993. Concurrent replies shall be filed no later than December 22, 1993.

DATED: November 23, 1993.

s/s EDWARD C. REED
UNITED STATES DISTRICT JUDGE

EXHIBIT E

EXCERPTS FROM "REGIONAL PLAN FOR THE LAKE TAHOE BASIN, GOALS AND POLICIES, TAHOE REGIONAL PLANNING AGENCY, SEPTEMBER 17, 1986"

STREAM ENVIRONMENT ZONE

Stream environment zones (SEZs) and related hydrologic zones consist of the natural marsh and meadowlands, watercourses and drainageways, and floodplains which provide surface water conveyance from upland areas into Lake Tahoe and its tributaries. Stream environment zones are determined by the presence of riparian vegetation, alluvial soil, minimum buffer strips, water influence areas, and floodplains.

GOAL #1 PROVIDE FOR THE LONG-TERM PRESERVATION AND RESTORATION OF STREAM ENVIRONMENT ZONES.

The preservation of SEZs is a means for achieving numerous environmental thresholds. Policies that promote their maintenance, protection, and restoration are listed below.

POLICIES

5. NO NEW LAND COVERAGE OR OTHER PERMANENT LAND DISTURBANCE SHALL BE PERMITTED IN STREAM ENVIRONMENT ZONES EXCEPT FOR THOSE USES AS NOTED IN A, B, C, D, AND E BELOW:

   A. PUBLIC OUTDOOR RECREATION FACILITIES ARE PERMISSIBLE USES IN STREAM ENVIRONMENT ZONES IF: (1) THE PROJECT IS A NECESSARY PART OF A PUBLIC AGENCY'S LONG RANGE PLANS FOR

PUBLIC OUTDOOR RECREATION; (3) THE PROJECT, BY ITS VERY NATURE, MUST BE SITED IN A STREAM ENVIRONMENT ZONE; (4) THERE IS NO FEASIBLE ALTERNATIVE WHICH WOULD REDUCE THE EXTENT OF ENCROACHMENT IN STREAM ENVIRONMENT ZONES.

B. PUBLIC SERVICE FACILITIES ARE PERMISSIBLE USES IN STREAM ENVIRONMENT ZONES IF: (1) THE PROJECT IS NECESSARY FOR PUBLIC HEALTH, SAFETY, OR ENVIRONMENTAL PROTECTION; (2) THERE IS NO REASONABLE ALTERNATIVE, INCLUDING SPANS, WHICH AVOIDS OR REDUCES THE EXTENT OF ENCROACHMENT IN STREAM ENVIRONMENT ZONES;

C. PROJECTS WHICH REQUIRE ACCESS ACROSS STREAM ENVIRONMENT ZONES TO OTHERWISE BUILDABLE SITES ARE PERMISSIBLE IN SEZs IF: (1) THERE IS NO REASONABLE ALTERNATIVE, WHICH AVOIDS OR REDUCES THE EXTENT OF ENCROACHMENT IN THE SEZ.

D. NEW DEVELOPMENT MAY BE PERMITTED IN MAN-MODIFIED STREAM ENVIRONMENT ZONES

E. STREAM ENVIRONMENT ZONE RESTORATION PROJECTS AND EROSION CONTROL PROJECTS.

APPENDIX F

EXCERPTS FROM "REGIONAL PLAN--CODE OF ORDINANCE"

20.3.A Base Land Coverage Requirements: The allowable base land coverage ("base coverage") shall be determined by using the coefficients set forth in the report entitled, Land Capability Classifications of the Lake Tahoe Basin, Bailey, R.G. 1974. These coefficients are:

Lands Located In Land Capability District*	Base Coverage
1a, 1b, 1c	1%
2	1%
3	5%
4	20%
5	25%
6, 7	30%

*Lands located in Geomorphic Group I are classified land capability district 1 and are permitted one percent coverage.

...

20.3.C Manner Of Transferring Land Coverage: Land coverage transferred to eligible parcels for eligible uses prescribed by Subsection 20.3.B, shall be transferred in the manner set forth in this Subsection. A transfer of land coverage may be from one parcel to another and may occur in connection with TRPA's approval of: a project; a community plan; redevelopment plan; a specific or master plan; or a transfer of coverage program for a subdivision. Transfers shall be recorded in accordance with Chapter 38, shall not result in land coverage on eligible parcels in excess of

the maximum amounts prescribed by Subsection 20.3.B, and shall be in accordance with the provisions of this chapter. Transfers may be undertaken in connection with Chapter 34. Removal of existing land coverage without transfer in connection with a project, in the manner and as otherwise required by this chapter, may be accomplished, by crediting the coverage account of the pertinent parcel pursuant to Chapter 38. Land coverage banks may be designated by TRPA pursuant to Chapter 38, which banks may provide a supply of land coverage to accommodate individuals needing coverage for transfer purposes.

...

(2) Types Of Land Coverage Eligible For Transfer: The following types or classes of legally established land coverage are eligible for transfer to receiving parcels in accordance with the provisions of this Chapter:

...

(c) Base Coverage: Unused allowable base land coverage referred to in Subsection 20.3.A may be transferred in all cases, except for transfers relating to commercial uses or facilities. Land coverage transferred as mitigation for excess coverage associated with commercial and tourist accommodation projects shall be existing hard coverage except as provided in Subparagraph 20.3.C(6).

...

(3) Sending Parcels Classified As Sensitive Lands (Lands Capability Districts 1-3):

If land coverage is transferred from a sending parcel that is located, in whole or in part, in Land Capability Districts 1 through 3, inclusive, or is at or below the initial level defining the top rank under IPES (i.e., 725), the coverage transferred shall be permanently retired in the manner set forth in Subparagraph 20.3.C(7) and may not be returned to the sending parcel.

...

(7) Restoration And Retirement Of Land Coverage: Land coverage shall be restored and retired pursuant to Section 34.5 and the following:

(a) Transfers: TRPA shall ensure that land coverage transferred pursuant to Subsection 20.3.C shall be retired permanently pursuant to the following requirements:

(i) In the event land coverage is removed from the sending parcel, the applicant or a public agency shall restore the sending parcel to a natural or near natural state;

(ii) Provisions for future maintenance and protection of the parcel from further soil disturbance shall be made, whether or not the parcel is undisturbed or subject to restoration; and

(iii) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently assuring the accomplishment of the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii)

shall be recorded by the owner. TRPA shall obtain binding assurance from a public agency that the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii) are permanently met.

...

20.4 Prohibition Of Additional Land Coverage In Land Capability Districts 1a, 1c, 2 And 3 And 1b (Stream Environment Zones): No additional land coverage or other permanent land disturbance shall be permitted in Land Capability Districts 1a, 1c, 2, and 3 and Land Capability District 1b (stream environment zones) except as follows:

...

20.4.B Exceptions For Land Capability District 1b (Stream Environment Zone): The following exceptions apply to the prohibition of land coverage and disturbance in land capability district 1b (stream environment zone):

(1) Stream Crossings: Land coverage and disturbance for projects to effect access across steam environment zones to otherwise buildable sites, if such projects otherwise comply with applicable development standards in Chapter 27, may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in the stream environment zone, or that encroachment is necessary to reach the building site recommended by IPES; and

(b) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall include coverage and disturbance within the permitted Bailey coefficients.

(2) Public Outdoor Recreation: Land coverage and disturbance for public outdoor recreation facilities may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) The project is a necessary part of a public agency's long range plans for public outdoor recreation;

(b) The project is consistent with the Recreation Element of the Regional Plan;

(c) The project, by its very nature must be sited in a stream environment zone, such as bridges, stream crossings, ski run crossings, fishing trails, and boat launching facilities; in accordance with the Guidelines Regarding Public Outdoor Recreation Facilities and Activities Which Create Additional Land Coverage or Permanent Disturbance and Which By Their Very Nature Need Not Be Sited in Sensitive Lands (1a, 1b, 1c, 2, 3 or SEZs), Water Quality management Plan for the Lake Tahoe Region, Volume I, Table 16, dated November, 1988.

(d) There is no feasible alternative which would avoid or reduce the extent of encroachment in the stream environment zone; and

(e) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall include coverage and disturbance within the permitted Bailey coefficients.

(3) Public Service: Land coverage and disturbance for public service facilities may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) The project is necessary for public health, safety or environmental protection;

(b) There is no reasonable alternative, including a bridge span or relocation, which avoids or reduces the extent of encroachment in the stream environment zone; and

(c) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall

include coverage and disturbance within the permitted Bailey coefficients.

(4) Water Quality Control Facilities: Land coverage and disturbance may be permitted in Land Capability District 1b (stream environment zones) for erosion control projects, habitat restoration projects, wetland rehabilitation projects, stream environment zone restoration projects and similar programs and facilities if TRPA finds that:

(a) The project, program, or facility is necessary for environmental protection;

(b) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in the stream environment zone; and

(c) Impacts are fully mitigated and, if applicable, transferred land coverage requirements pursuant to 20.3.C(2)(e) are met.

...

34.2 Transfer Of Residential Development Right: A residential development right, as defined in Chapter 2, may be transferred to another parcel pursuant to the following provisions:

34.2.A Vacant Parcel: The parcel from which the right is transferred shall be vacant and have a residential development right;

34.2.B Parcel Retirement: The parcel from which the development right is transferred is retired pursuant to Section 34.5 at the time of transfer;

34.2.C Receiving Area: The parcel receiving the development right shall be in a plan area or

community plan where residential uses are permissible and shall meet the following criteria:

(1) Parcels Eligible To Receive One Or More Development Rights: Parcels located in a plan area or community plan designated as a receiving area for multi-residential units shall be eligible to receive one or more development rights, or

(2) Parcels Eligible To Receive One Development Right:

(a) One development right may be transferred to a parcel for the purpose of constructing a secondary residence, provided the building site for the secondary residence is in Land Capability Districts 4, 5, 6 or 7.

(b) One development right may be transferred to a parcel that was not assigned a development right provided the parcel has a building site in Land Capability Districts 4, 5, 6 or 7, or, if applicable, is in the top rank under IPES.

34.2.D Density: The transfer complies with the density of use provisions for the receiving parcel;

34.2.E Local Approval: The approval of affected local governments shall be obtained;

34.3 Transfer of Residential Allocations: If, pursuant to Chapter 33, a parcel is assigned a residential allocation, the allocation may be transferred to another parcel, pursuant to the following provisions and the provisions of Section 36.4 if applicable.

34.3.A Parcel Classification: The allocation transfer is from a parcel determined to be in Land Capability Districts 1a, 1b, 1c, 2 or 3; shorezone tolerance

districts 1, 2, 3, or 4; below the top rank IPES line, if applicable; or unsuitable for development due to the inability of the property to meet TRPA or local government development standards.

34.3.B Building Site: The receiving parcel has a building site that is determined to be in Land Capability Districts 4, 5, 6, or 7; or, if applicable, in the top rank under IPES.

34.3.C IPES Limitation: No allocation shall be transferred to any parcel that is below the initial level defining the top rank under IPES unless the number of vacant parcels in the top rank at the time of the proposed transfer is less than 1/2 the total inventory in that jurisdiction;

34.3.D Permissible Use: The receiving parcel is in a plan area or community plan where residential uses are permissible use on the receiving parcel.

34.3.E One Transfer: Subject to the limits in Chapter 33, an allocation may be transferred only one time and shall continue to count against the jurisdiction to which it was originally issued.

34.3.F Local Approval: The approval of affected local governments shall be obtained.

34.3.G Parcel Retirement: The sending parcel is retired pursuant to Section 34.5 at the time the allocation is transferred.

...

34.5 Restriction Or Retirement Of Parcels: Restriction or retirement of parcels, of portions of parcels, for the purposes set forth in this Code, shall comply with the following requirements:

34.5.A Land Coverage: Parcels from which land coverage has been transferred are subject to provisions of Chapter 20.

34.5.B Allocation Transfer: Parcels from which allocations have been transferred shall be permanently retired.

(1) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently removing the development rights shall be recorded by the owner.

(2) For parcels in public ownership, the public agency shall provide TRPA with binding assurance that the development rights have been permanently retired.

...

34.5.H Development Rights Transfer On Sensitive Lands: Parcels in Land Capability Districts 1a, 1b, 1c, 2, or 3, or SEZ, from which all residential development rights have been transferred, shall be permanently retired.

(1) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently removing the development rights from the parcel shall be recorded by the owner.

(2) For parcels in public ownership, the public agency shall provide TRPA with binding assurance that the development rights have been permanently retired.

...

35.2.C Determination Of The Number Of Bonus Units: Applications for projects proposing the use of residential bonus units shall include a list and description of all mitigation measures identified in Subsection 35.2.D that are proposed as part of the project. Based on review of the list and description of the mitigation measures proposed, TRPA shall determine a score for the project in accordance with Subsection 35.2.D. One residential bonus unit may be approved for each ten points received by a project.

35.2.D Mitigation Measures: Projects proposing the use of multi-residential bonus units shall receive a score only when one or more of the following mitigation measures are proposed as part of the project.

...

(4) Retirement, in accordance with Chapter 34, of an undeveloped parcel located in Land Capability Districts 1a, 1b (SEZ), 1c, 2, or 3:

...

(b) If the parcel is in Land Capability District 1b or in a stream environment zone - 30 points per transferred unit.

APPENDIX G

TAHOE REGIONAL PLANNING AGENCY

P.O. Box 1038
195 U.S. Highway 50 Zephyr Cove, Nevada (702) 588-4547
Round Hill, Zephyr Cove, NV 89448-1038 Fax (702) 588-4527

Type of Transfer (Check Applicable Box)

__ Land Coverage Transfer
__ Existing Development Transfer (improved parcel)
__ Development Right Transfer (unimproved parcel)
__ Allocation Transfer

TRANSFER DESCRIPTION:

FROM (sending parcel): _____ To (receiving parcel) _____
(APN) (APN)

(If more than one receiving parcel list in comment section.)

OWNER(S) OF RECORD (sending parcel):

Name(s): _____ Phone: _____

Mailing Address: _____ City: _____ State: ___ Zip: _____

OWNER(S) OF RECORD (receiving parcel):

Name(s): _____ Phone: _____

Mailing Address: _____ City: _____ State: ___ Zip: _____

PERSON AUTHORIZED TO REPRESENT THE TRANSFER AND TO WHOM ALL CORRESPONDENCE IS TO BE SENT:

Name(s): _____ Phone: _____

Mailing Address: _____ City: _____ State: ___ Zip: _____

LOCATION OF PROPERTY: (Stake property corners of sending and receiving parcels and provide location maps as necessary)

SENDING PARCEL:

County: _____ Subdivision: _____ Lot#: _____

Street: _____ Adjacent parcel Addresses: _____

RECEIVING PARCEL:

County: _____ Subdivision: _____ Lot#: _____

Street: _____ Adjacent parcel Addresses: _____

PROPERTY RESTRICTIONS (List any deed restrictions, easements or other restrictions on property):

Sending Parcel: _____

_____

Receiving Parcel: _____

_____

PRIOR APPROVALS: (List any prior local or CTRPA/TRPA approvals/permits received for the subject property):

Sending Parcel:

Agency: _____ Permit Type: _____ Date: _____ Permit # _____

Agency: _____ Permit Type: _____ Date: _____ Permit # _____

Receiving Parcel:

Agency: _____ Permit Type: _____ Date: _____ Permit # _____

Agency: _____ Permit Type: _____ Date: _____ Permit # _____

Is the sending parcel free of nuisance and hazard (i.e., foundations, excavations, spoil piles)? _____ If no, please describe in comment section.

Does the receiving parcel meet the basic service requirements of Chapter 27 of the TRPA Code of Ordinances including but not limited to: 1) served by paved roadway; 2) adequate water rights and water supply system; 3) sewer service; and 4) electrical service? _____ If no, please describe in comment section.

Existing Land Coverage:

Sending Parcel _____ Square Feet of Hard Coverage

Sending Parcel _____ Square Feet of Soft Coverage (dirt roads, paths, and parking)

Existing and Proposed Uses of Property:

Sending Parcel _____

_____

Receiving Parcel _____

_____

Amount of Land coverage to be transferred (if applicable): _____

Comments: _____

_____

_____

I hereby declare under penalty of perjury that this application and all information submitted as part of this application, are true, complete, and accurate to the best of my knowledge. Should any information or representation submitted in connection with this application be incorrect or untrue, I understand that TRPA may rescind any approval, or take other appropriate action.

Signed _____ At _____ Dated _____
(Property owner(s)) (County)

AUTHORIZATION FOR REPRESENTATION:

The following person(s) is owner of the subject property (APN _____)
or of a sufficient interest therein to make this application:

(Print Owners(s) name(s) _____

_____

If the applicant is not the sole owner of the property, list the names and addresses of the owners and the legal relationship of the applicant to the owner(s) that entitles the applicant to make this application.

_____

_____

As such he/she/they authorize _____ to act as his/her/their representative in connection with this application for the subject property and agree to be bound by said representative. Any cancellation of this authorization shall not be effective until receipt of written notification of same by TRPA. I understand that if this project is approved that I, as the permittee, will be held responsible for any and all permit conditions.

REQUIREMENTS FOR COMPLETE APPLICATION: _____
Owner's Signature Date

____ 1. Completed Application Form

____ 2. Application Fee

____ 3. Site Plan (if transferring existing coverage)

FOR OFFICE USE ONLY

Date Received: _____ By: _____

Complete Application: _____ By: _____
$240
Filing Fee: ___: _____ Receipt #: _____